

**STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
WORKERS' COMPENSATION APPEALS BOARD**

INITIAL STATEMENT OF REASONS

**Subject Matter of Proposed Regulations:
Rules of Practice and Procedure of the Workers' Compensation Appeals Board**

BACKGROUND TO REGULATORY PROCEEDING:

The Workers' Compensation Appeals Board (WCAB) proposes to amend its Rules of Practice and Procedure (Rules),¹ specifically those relating to lien claims. These proposed amendments are being initiated pursuant to the WCAB's rulemaking power under Labor Code sections 5307(a), 133, 5309 and 5708,² subject to the procedural requirements of section 5307.4. This Initial Statement of Reasons and accompanying Notice of Proposed Rulemaking have been prepared to comply with the procedural requirements of section 5307.4 and for the convenience of the regulated public to assist it in analyzing and commenting on this largely non-APA rulemaking process.³

1. Section Added: 10582.5.

Statement of Specific Purpose and Reasons for Proposed Addition of Section 10582.5

Proposed new Rule 10582.5 essentially provides that, after a lien claimant is given notice and an opportunity to be heard, a lien claim may be dismissed for lack of prosecution if the lien claimant does not file a declaration of readiness to proceed (DOR): (1) within one year after it has become a "party";⁴ or (2) within one year after the entry of an order taking a lien conference or lien trial in which the lien claim is directly at issue off calendar, whichever is later. Proposed new Rule 10582.5 is modeled in part on the current Rule 10852 (Cal. Code Regs., tit. 8, § 10582), which allows an injured employee's entire case to be dismissed for lack of prosecution, after notice and an opportunity to be heard, unless it is activated for hearing within one year after the filing of the application or after the entry of an order taking the case off calendar.

The proposed procedure of Rule 10582.5 will cause lien claimants to pursue their lien claims in a timely manner, before evidence is lost and witnesses disappear or have their memories dimmed. This will result in a reduction of the number of hearings needed to address discovery issues in lien cases. Such hearings arise more frequently when evidence is no longer available or difficult to resurrect.

Also, the proposed procedure will create more certainty and predictability in workers' compensation claims management by allowing insurance carriers and self-insured employers to close their cases, liquidate their reserves, and more accurately predict future liabilities.

Further, the proposed procedure will allow a dormant lien claim to be dismissed through pleadings, without a hearing, if a lien claimant does not timely object to the dismissal after having notice and an opportunity to be heard. Therefore, calendar time that otherwise would be used can be devoted to hearings resolving disputes between injured employees and their employers or insurance carriers over the employees' rights to benefits.

The provisions of proposed new Rule 10582.5 will not become operative until January 1, 2012, thereby giving lien claimants a reasonable time to file a DOR before their lien claims would be subject to potential dismissal for lack of prosecution. (See *Rosefield Packing Co. v. Superior Court* (1935) 4 Cal.2d 120, 122 [a party must

¹ The WCAB's are found in Cal. Code Regs., Title 8, Chapter 4.5, Subchapter 2, section 10300 et seq.

² All further statutory references are to the Labor Code unless otherwise specified.

³ Under Government Code section 11351, the WCAB is not subject to Article 5 (Gov. Code, § 11346 et seq.), Article 6 (*id.* § 11349 et seq.), Article 7 (*id.* § 11349.7 et seq.), or Article 8 (*id.* § 11350 et seq.) of the rulemaking provisions of the Administrative Procedures Act (APA), with the sole exception that section 11346.4(a)(5) [publication in the California Regulatory Notice Register] does apply to the WCAB.

⁴ Only a party may file a DOR (Cal. Code Regs., tit. 8, § 10250(a)). A lien claimant becomes a party when the injured employee's underlying case has been resolved or the employee has chosen not to proceed with it (Cal. Code Regs., tit. 8, §§ 10301(x)(3) and 10210(y)).

have a reasonable time to avail itself of a remedy before its right is cut off]; cf. Lab. Code, § 5814 [two-year statute of limitations for filing a penalty claim enacted by Senate Bill (SB) 899 [§5814(g)] did not become operative until June 1, 2004 [§5814(i)], thus giving injured employees approximately 2-½ months after SB 899's April 19, 2004 effective date to perfect their penalty claims].)⁵

Specific Technologies or Equipment

The proposed addition of this rule does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the proposed addition.

Effect on Small Businesses

The proposed addition of this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The proposed addition of this rule will not have a significant economic impact on California business enterprises and individuals.

2. Section Amended: 10770.

Statement of Specific Purpose and Reasons for Proposed Amendments to Section 10770

Proposed Rule 10770(a) will make minor, non-substantive changes regarding what information lien claims must have and how they must be formatted when filed; however, liens filed in paper format (as opposed to being e-filed or Jet-filed) still must utilize optical character recognition (OCR) forms.

Proposed Rule 10770(b)(2) duplicates the language in current Rule 10770(d), i.e., it simply moves that language to proposed Rule 10770(b)(2).

Proposed Rule 10770(b)(1) and (b)(3) will change the filing requirements for lien claims to provide that only original (i.e., opening) liens shall be filed, and not amended liens, and that no supporting documentation for *any* liens shall be filed—except that supporting documentation and/or amended liens may be filed as proposed exhibits (see Cal. Code Regs., tit. 8, § 10233(g) & (h)) or as ordered by a workers' compensation judge or the WCAB.

For liens filed in paper format, proposed Rule 10770(b)(1) and (b)(3) will significantly reduce the overall volume of paper being filed at the district offices, which will help alleviate scanning backlogs.⁶ These provisions also will have other beneficial effects, including: (1) reducing the number of support staff needed to process lien filings; (2) reducing wear and tear on office equipment; and (3) eliminating the need to correct defects or to prepare and issue deficiency notices—with their associated costs of postage, paper, and envelopes (see Cal. Code Regs., tit. 8, § 10222(a)) that would result if amended liens were still filed, thereby allowing support staff to perform other functions.

Proposed Rule 10770(b)(5) provides that if written notice of a lien claim is given to a defendant, this will not constitute the “filing” of a lien with the WCAB. Also, proposed Rule 10770(b)(6) provides that if a lien has

⁵ This 2-½ month period was determined to be reasonable under *Rosefield Packing*. (*Green v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 1426, 1441 [70 Cal.Comp.Cases 294]; *Abney v. Aera Energy* (2004) 69 Cal.Comp.Cases 1552, 1561-1562 (Appeals Board en banc).)

⁶ As it was originally envisioned, the Electronic Adjudication Management System (EAMS) was going to be virtually paperless. However, due to problems that need not be addressed here, the vast majority of documents are currently being filed in paper form (see, generally, Cal. Code Regs., tit. 8, §§ 10210(m) & (x), 10228(a), (c), (d), (e), & (f), 10232, 10232.1, 10232.2, 10400, 10770, 10845, 10866(c)) and then scanned into EAMS by district office staff (see Cal. Code Regs., tit. 8, §§ 10210(m) & (x), 10216(a), 10228(b), 10295(g), 10296(e)). Because of the sheer volume of documents that must be scanned, some district offices have significant scanning backlogs.

been “served” on a party, that party will have no obligation to “file” that lien with the WCAB if, after such service, partial or full payment is tendered or made and no additional written demand for payment is served on the party within three months thereafter. Further, proposed Rule 10770(c) deletes the language that “[s]ervice of a lien on a party shall constitute notice to it of the existence of the lien.” For the reasons set forth in the paragraph below, these provisions will close a loophole in the statute of limitations laws that created an incentive for entities to purchase old accounts receivables, file liens (informally called “zombie liens”), and use the WCAB’s scarce judicial resources to collect payment on ancient bills.

Current Labor Code section 4904(a) provides in substance that if a defendant has written notice of a claim that would qualify as a lien, such notice constitutes a lien.⁷ Current section 4903.1(b) provides that when a compromise and release agreement (C&R) or stipulated Findings and Award (stip F&A) is submitted to the WCAB, a party shall “file” with the WCAB any lien that was “served” on it. Current section 4903.5 establishes time limitations on when a lien may be “filed.” The proposed amendments to Rule 10770 described in the paragraph above, in effect: (1) interpret section 4904(a) to mean that written notice to a defendant of a lien does not equate to “filing” the lien with the WCAB; (2) interpret section 4904(a) to mean that a defendant does not have “notice” that a lien is being asserted if the lien claimant is silent for at least three months after a defendant has made some payment to it; and (3) interpret section 4903.1(b) to mean that, after a C&R or a stip F&A, a defendant is not required to “file” any liens served on it if the lien claimant fails to make any additional written demand within three months after the defendant has made some payment. These interpretations are consistent with the language and intent of these statutes and give greater force to the statute of limitations provisions of section 4903.5.⁸

Proposed Rule 10770(c) provides that lien claimants still must serve original liens, amended liens, and all supporting documentation on the parties. Therefore, the parties will remain fully apprised of the nature and amount of each lien claim.

Proposed Rule 10770(g) provides that a lien claimant may be served with notice of a hearing by a party who is designated to serve (see Cal. Code Regs., tit. 8, §§ 10500(a), 10544).

Proposed Rule 10770(i) reminds parties and lien claimants that any violation of Rule 10770’s provisions may result in sanctions.

The balance of Rule 10770 is essentially unchanged.

Specific Technologies or Equipment

The proposed amendments to this rule do not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the proposed amendments.

Effect on Small Businesses

The proposed amendments to this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The proposed amendments to this rule will not have a significant economic impact on California business enterprises and individuals.

⁷ The question of whether this language of section 4904(a) is limited only to the lien claims of the Employment Development Department (EDD) has not been resolved by a binding en banc or appellate decision.

⁸ As of the date of this Initial Statement, SB 863 would amend section 4904(a) to make clear that its written notice provisions apply only to EDD liens and would amend 4903.1 to eliminate the requirement that a defendant must “file” any liens served on it. SB 863 was passed by the Senate on a 37-0 vote and by the Assembly Committee on Insurance by a 11-0 vote (http://www.leginfo.ca.gov/cgi-bin/postquery?bill_number=sb_863&sess=CUR&house=B&author=lieu).

3. Section Added: 10770.1.

Statement of Specific Purpose and Reasons for Proposed Addition of Section 10770.1

Proposed Rule 10770.1(a) describes how a “lien conference” may come to be set, including on the WCAB’s own motion, but it makes clear that Rule 10770.1’s provisions: (1) do not circumscribe the WCAB’s discretion under Rule 10420 to set a lien issue for a hearing other than that requested by a DOR; do not circumscribe the WCAB’s authority under Rule 10888 to issue a 10-day notice of intention to disallow a lien, or to allow it in whole or in part, after a case has been resolved by a C&R; and (3) do not allow a lien claimant to file a DOR unless it is a “party” (see fn. 4, *supra*).

Proposed Rule 10770.1(b) provides that when a lien claimant or party files a DOR on an issue directly relating to a lien, the DOR must specify that a “lien conference” is being requested and, if another type of hearing is requested or set, it shall still be deemed a “lien conference.” By requiring the “lien conference” designation, this will eliminate confusion by lien claimants, parties, and judges about the nature and effect of any conference on lien issues. Therefore, it will also eliminate trials, petitions for reconsideration, and petitions for removal regarding the nature of a judge’s authority and discretion to act at a conference on lien issues.

Proposed Rule 10770.1(c) and (d) provide that if any lien(s) or lien issue(s) in dispute at a lien conference cannot be resolved, then: (1) the lien claimant(s) and defendant(s) shall prepare a pretrial conference statement that frames the stipulations and issues and lists documentary evidence and witnesses for a lien trial; and (2) discovery shall close.

The provisions of Rule 10770.1(c) and (d) make clear that a “lien conference” is a special type of mandatory settlement conference (MSC) pertaining to lien issues. Labor Code section 5502(e)(1) provides that an MSC shall be conducted “[i]n all cases” (emphasis added) and further provides that “[i]f the claim is not resolved at the [MSC]” then “[d]iscovery shall close” and the parties shall prepare a pretrial conference statement that lists exhibits and witnesses. Section 5502(e)(1) does not exclude cases involving lien disputes from these requirements. The requirements that stipulations and issues must be framed, that documentary evidence and witnesses must be listed, and that discovery will close at a lien conference will force lien claimants and parties to prepare in advance of the lien conference. This will mean that lien claimants and parties will not file a DOR on a lien issue until they are actually ready to proceed, thus eliminating the scheduling of many unnecessary lien conferences, including those set at the request of lien claimants who have done little or no discovery, with the hope that a defendant will pay something on the lien rather than bearing the cost of litigating it. Accordingly, there will be more calendar time for hearings resolving disputes between injured employees and their employers or insurance carriers over the employees’ rights to benefits.

Rule 10770.1(e) provides that if a lien issue cannot be resolved at a lien conference, the lien issue shall be set for trial except, upon a showing of good cause, there may be a one-time continuance or the lien conference may be taken off calendar. Also, Rule 10770.1(h) provides that if a lien conference is taken off calendar, a new DOR cannot be filed for 90 days. These provisions will reduce the number of lien conferences in each case, thereby freeing up valuable calendar time. Also, these provisions will make it harder for e-filers (see Cal. Code Regs., tit. 8, § 10229) and others to manipulate the calendar by obtaining a lien conference, going off calendar, filing for another lien conference immediately or shortly thereafter, and repeating the cycle to avoid being set for a lien trial.

Rule 10770.1(f) provides that if a lien claimant fails to appear at a lien conference, the WCAB may dismiss the lien after giving the lien claimant notice and an opportunity to be heard either through a 10-day notice of intention or an order that is void if objection showing good cause is filed within 10 days (i.e. a “self-destruct” order). This gives the WCAB an alternative method of resolving liens without necessitating additional calendar time or requiring significant additional use of judicial, secretarial, and clerical resources.

Rule 10770.1(g) provides that, if no witnesses are listed in the pretrial conference statement at a lien conference, or if any offer(s) of proof show no good cause for the witnesses listed, the lien issues may be submitted for decision. This will give the WCAB the discretion, in some circumstances, not to set a lien trial, thereby preserving valuable calendar time. The provision allowing a case to be submitted for decision if there is no

good cause for each and every witness listed is consistent with Evidence Code sections 350 and 351, which allow the presentation only of “relevant” evidence (see also Evid. Code, § 210), and section 352, which provides that “[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time.”

Rule 10770.1(i) provides that when a defendant has been designated to serve a lien claimant with notice of a lien conference or trial (see Cal. Code Regs., tit. 8, §§ 10500(a), 10544), the defendant shall bring its proof of service to the lien conference or trial and, if the lien claimant fails to appear, file it with the WCAB. This provision will more easily allow the WCAB to issue a 10-day notice of intention or “self-destruct” order if a lien claimant fails to appear at a lien conference. The provision also emphasizes the obligation of a defendant to actually serve notice when it has been designated to serve. This will cause proper designated service to occur more frequently, resulting in better attendance at lien conferences and reducing the number of continuances due to improper service, thereby preserving valuable calendar time.

Proposed Rule 10770.1(j) reminds parties and lien claimants that any violation of Rule 10770’s provisions may result in sanctions.

Specific Technologies or Equipment

The proposed addition of this rule does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the proposed addition.

Effect on Small Businesses

The proposed addition of this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

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